**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **NORMA L. CANTU**<br>Claimant<br><br>VS.<br><br>**CORE-MARK**<br>Respondent<br><br>AND<br><br>**LIBERTY INSURANCE CORP.**<br>Insurance Carrier | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Docket No. **1,023,429** |

## ORDER

Claimant requested review of the March 28, 2008 Award by Administrative Law Judge Pamela J. Fuller. The Board heard oral argument on June 10, 2008.

### APPEARANCES

Joseph Seiwert of Wichita, Kansas, appeared for the claimant. Terry J. Malone of Dodge City, Kansas, appeared for respondent and its insurance carrier.

### RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

### ISSUES

Norma L. Cantu suffered injuries in a work-related automobile accident. The parties were unable to agree upon the nature and extent of her disabilities or the amount of her average gross weekly wage. The Administrative Law Judge (ALJ) determined that Cantu was not entitled to a work disability (a permanent partial general disability greater than the functional impairment rating) and awarded her compensation based upon a 9 percent whole person functional impairment. The ALJ further determined that Cantu's average

gross weekly wage was $572.06 and increased to $644.41 on January 1, 2007, when her fringe benefits were discontinued.[1]

Cantu requests review and argues the ALJ erred in the computation of the average gross weekly wage. Cantu argues the wage calculation should include an auto allowance that she received. Cantu further argues that she is entitled to a work disability.

Respondent argues the ALJ's Award should be affirmed.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Norma Cantu worked as a sales consultant for respondent. Her job duties included selling products such as candy, groceries, and snack items to convenience stores. The job required extensive travel and Cantu drove from 1,200 to 2,800 miles a week or roughly 60,000 miles a year. She drove her own car but respondent provided her with a fixed rate monetary car allowance which was not based upon mileage. Respondent also provided her a gas card and reimbursed her for meals as well as cell phone usage.

On April 18, 2005, Cantu was driving a route through several small towns and then went to Dodge City for a 3 p.m. appointment with a prospective customer. Cantu had also scheduled an appointment with her chiropractor in Dodge City over her lunch break. After her chiropractic appointment she returned to her car in the doctor's parking lot and began using her cell phone to make business calls to customers. After her last call she was sitting in her car writing notes about the conversations when a vehicle, which was in an accident on an adjacent street and had become airborne, landed on top of her car.

Cantu immediately experienced pain in both of her knees and was transported by ambulance to the Dodge City Western Plains Medical Complex emergency room. At the hospital she also experienced severe headaches as well as neck pain and shoulder stiffness. X-rays of her right knee and left leg were normal. She was treated with pain medications and released. Cantu notified her employer about the accident and then took off work the following week.

Cantu continued to experience headaches with neck pain as well as upper and lower back pain radiating into the left leg. She received chiropractic treatment and then

[1] See K.S.A. 2005 Supp. 44-511(a)(2)(E).

medical treatment for her ongoing complaints. The respondent initially denied the claim and after a preliminary hearing on July 14, 2005, the ALJ authorized Dr. Sager to continue to provide Cantu medical treatment. Because Cantu had difficulty raising her arm she was given steroid injections. She was also prescribed acupuncture as well as physical therapy and massage therapy. And Dr. Sager referred Cantu for frequent chiropractic treatment.

Dr. Sager released Cantu to return to work 32 hours a week which was later increased to a 40-hour work week. But Cantu was unable to maintain a 40-hour work week and Dr. Sager again limited her to a 32-hour work week. However, Cantu continued to complain of pain and fatigue, especially due to driving, and Dr. Sager finally reduced her to a 28-hour work week but recommended that she find an office job. Cantu testified that the driving as well as stocking products irritated her neck and back.

Before the work-related accident Cantu had been diagnosed with fibromyalgia on December 1, 1999. Dr. Sager had treated Cantu for that condition primarily by a change in lifestyle as well as physical exercise. Cantu had last seen Dr. Sager in 2002 for the fibromyalgia condition. But she continued to see a chiropractor approximately once a month for her fibromyalgia condition.

Cantu testified that the accident worsened her preexisting fibromyalgia condition and caused her additional problems with both knees. She testified:

> Q. Okay. So in your opinion, did this accident that you had on April 18th of 2005, did that make your preexisting condition worse as well as caused some other problems.
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> A. Yes, it did. I no longer had the stamina I had before and just the additional injuries to my knees, to my shoulders and it made it difficult to even to try to work out. Physical exercise is something they encouraged people with fibromyalgia and it was difficult for the longest time to even take a stroll.[2]

Claimant testified that it is harder for her to work out due to her knee pain and that she has pain in her shoulders as well.

Cantu finally quit working for respondent because she could not keep up with her work duties. And she noted Dr. Sager had discouraged her from continuing to drive as much as required by her job with respondent. Her fringe benefits ended on December 31, 2006.

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[2] R.H. Trans. at 19-20.

Cantu then obtained a job with H & R Block from January through April 2007. Cantu next obtained employment on April 2, 2007, with Preferred Cartage Services as a receptionist and payroll clerk. She works a 40-hour work week and is paid $13 an hour.

At the request of Cantu's attorney, Dr. Pedro A. Murati examined claimant on September 19, 2006, for a permanent partial impairment evaluation. Dr. Murati diagnosed Cantu with left knee pain secondary to probable meniscal injury with cruciate instability, left patellofemoral syndrome, fibromyalgia, which is pre-existing but aggravated by the motor vehicle accident, myofascial pain syndrome affecting the bilateral shoulder girdles extending into the thoracic paraspinals, and left SI joint dysfunction and low back pain secondary to radiculopathy. Dr. Murati concluded all the diagnosed conditions were a direct result of the April 18, 2005 automobile accident.

Dr. Murati provided restrictions that Cantu only work four hours a day. Cantu was further restricted from climbing ladders, squatting, crawling, driving, kneeling or doing repetitive controls with the left leg. She was restricted from above shoulder work with both arms. She was further restricted to only occasional lift, carry, push or pull 10 pounds and frequent lift, carry, push or pull 5 pounds. She was also restricted to rarely stand, walk or climb stairs with no work more than 18 inches away from the body with both arms. Finally, Cantu was restricted from lifting below knuckle height and it was recommended that she needs a sit-down job.

Dr. Murati rated the claimant using the AMA *Guides*[3]. For the myofascial pain syndrome affecting the thoracic paraspinals Dr. Murati placed Cantu in Thoracolumbar DRE Category II for a 5 percent whole person functional impairment. For Cantu's low back pain, Dr. Murati opined she suffered a Lumbosacral DRE Category III 10 percent whole person functional impairment. Dr. Murati further opined Cantu suffered a 5 percent left lower extremity impairment for her left patellofemoral syndrome and for mild cruciate laxity an additional 10 percent to the left lower extremity which combine and convert to a 6 percent whole person impairment. Dr. Murati also opined Cantu suffered a 5 percent whole person functional impairment for pain from the aggravation of her fibromyalgia. Using the Combined Values Chart Dr. Murati conclude Cantu suffered a 24 percent permanent partial whole person functional impairment.

Dr. Murati reviewed the list of claimant's former work tasks prepared by Mr. Doug Lindahl and concluded claimant could no longer perform 13 of the 43 non-duplicative tasks for a 30 percent task loss.

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[3] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

At the request of respondent's attorney, Dr. Guillermo Garcia examined Cantu on October 2, 2006, for a permanent partial impairment evaluation. Dr. Garcia diagnosed Cantu with fibromyalgia exacerbated by her work-related accident and traumatic chondromalacia of the femoral patellar joint. Dr. Garcia rated Cantu using the AMA *Guides* and opined she suffered a 5 percent whole person functional impairment. Dr. Garcia did not place any permanent physical restrictions on Cantu. The doctor noted that Cantu would have good days and bad days because of her fibromyalgia but that was the nature of that condition and was not related to her accident. Nonetheless, when Dr. Garcia examined Cantu he felt she should return to work half-time and then after about two months she should return to full-time work with no restrictions.

Dr. Garcia reviewed the list of Cantu's work tasks prepared by Mr. Doug Lindahl and concluded claimant could perform all of the 43 non-duplicative tasks for a 0 percent task loss.

Dr. Terrance Pratt performed a court ordered examination of Cantu on March 9, 2007. Dr. Pratt reviewed Cantu's medical records and performed a physical examination. Dr. Pratt diagnosed Cantu with a history of fibromyalgia; a history of contusions with bilateral patellofemoral involvement; cervicothoracic and lumbosacral syndrome; history of scoliosis involving the thoracolumbar region; history of minimal cervical and lumbosacral spondylosis and left AC joint degenerative disease.

Dr. Pratt rated Cantu using the AMA *Guides* and opined she suffered a 5 percent impairment to her right lower extremity which converts to a 2 percent whole person impairment and a 5 percent impairment to her left lower extremity which converts to a 2 percent whole person impairment. Dr. Pratt placed Cantu in DRE Cervicothoracic Category II for a 5 percent whole person functional impairment. And Dr. Pratt also placed Cantu in DRE Lumbosacral Category II for a 5 percent whole person functional impairment. But Dr. Pratt concluded that 50 percent of Cantu's spinal permanency was present before the April 18, 2005 accident. Consequently, Dr. Pratt concluded that as a result of the accident, Cantu suffered a 5 percent whole person functional impairment for her spinal injuries. Dr. Pratt then combined the ratings and determined claimant suffered a 9 percent whole person functional impairment rating due to the April 18, 2005 accident.

Dr. Pratt provided restrictions that Cantu not perform any lifting in excess of 30 pounds and avoid pushing and pulling in excess of 70 pounds. Dr. Pratt did not believe that Cantu should limit the number of hours worked nor any reason to restrict Cantu from driving a vehicle. Dr. Pratt reviewed the list of Cantu's work tasks prepared by Mr. Doug Lindahl and concluded claimant could not perform 3 of the 43 non-duplicative tasks for a 7 percent task loss.

Doug Lindahl, a vocational rehabilitation counselor, conducted a personal interview with Cantu on October 13, 2006, at the request of Cantu's attorney. He prepared a task list of 43 tasks claimant performed in the 15-year period before her injury.

## Average Weekly Wage

The primary disputed issue regarding Cantu's average gross weekly wage is whether the weekly $92.31 car allowance she received should be included in the calculation of the average weekly wage.

Cantu's job required extensive travel to service existing customers and to seek additional customers. She drove her own car, was provided a credit card for fuel and received a car allowance. Respondent provided Cantu with a weekly $92.31 car allowance. The car allowance was paid at the same weekly rate and was not only included as income on Cantu's paycheck but was also taxed. The car allowance was not based upon the number of miles driven. Debra Palmer, respondent's human resource manager, testified that the car allowance is determined by the sales manager based upon the number of customers and while miles driven may be considered the car allowance is not a formula where the number of miles driven is multiplied by a set amount. And Palmer agreed that the car allowance was listed as gross income on Cantu's paycheck.

The calculation of claimant's average gross weekly wage, under certain circumstances, may also include additional compensation the respondent provided claimant.[4] However, not every payment made to an employee by an employer constitutes "wages" for purposes of computation of average weekly wage. The computation does include those payments for work performed to the extent it results in economic gain to the employee.[5] For example, based upon this analysis, payments to reimburse an employee for business related lodging while engaged in business travel are not included in the average gross weekly wage computation. The reimbursement for these expenses is dollar for dollar and does not result in economic gain to claimant. In this case respondent paid for Cantu's business related cell phone billings and this payment was not an economic benefit to Cantu and accordingly, its value would not be included as additional compensation in the determination of claimant's average gross weekly wage.

The weekly $92.31 car allowance payment made to Cantu is to be included as part of the average weekly wage as it does constitute economic gain to Cantu. As the records indicate, this money bore no direct relationship to the miles driven and was not a dollar for

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[4] K.S.A. 2005 Supp. 44-511(a)(1).

[5] *Ridgway v. Board of Ford County Comm'rs*, 12 Kan. App. 2d 441, 748 P.2d 891 (1987), *rev. denied* 242 Kan. 903 (1988).

dollar reimbursement. Moreover, the payment was treated as income and was taxed just as her wages were taxed. Consequently, there existed an economic gain and the $92.31 should have been included in the calculation of Cantu's average gross weekly wage. The ALJ's determination of Cantu's average gross weekly wage is modified to reflect a pre-injury average gross weekly wage of $664.37 which increases to $736.72 on January 1, 2007, when fringe benefits were discontinued.

**Nature and Extent of Disability**

The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.[6] It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony with the testimony of the claimant and others in making a determination on the issue of disability. The trier of fact must make the ultimate decision as to the nature and extent of injury and is not bound by the medical evidence presented.[7]

In *Bryant*[8], the Kansas Supreme Court stated the general rule:

> If a worker sustains only an injury which is listed in the -510d schedule, he or she cannot receive compensation for a permanent partial general disability under -510e. If, however, the injury is both to a scheduled member and to a nonscheduled portion of the body, compensation should be awarded under -510e.

Because Cantu sustained permanent impairment to her cervical and lumbosacral spine, which are nonscheduled injuries, all of her injuries, both scheduled and nonscheduled, are to be combined and compensated as a permanent partial disability under K.S.A. 44-510e.

In this case the doctors' whole person functional impairment ratings included a 5 percent rating, a 9 percent rating and a 24 percent rating. Cantu continues to express complaints but has demonstrated the ability to return to full-time employment as predicted by Dr. Garcia and expected by Dr. Pratt. The Board agrees with the ALJ's determination that Dr. Pratt's rating was the most persuasive. But the Board does not agree that Dr. Pratt's rating for Cantu's spinal impairments should be reduced by 50 percent.

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[6] *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

[7] *Graff v. Trans World Airlines,* 267 Kan. 854, 983 P.2d 258 (1999).

[8] *Bryant v. Excel*, 239 Kan. 688, 689, 722 P.2d 579 (1986).

The Workers Compensation Act provides that compensation awards should be reduced by the amount of preexisting functional impairment when the injury is an aggravation of a preexisting condition. The Act reads:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.[9]

The Board interprets the above statute to require that a ratable functional impairment must preexist the work-related accident. The statute does not require that the functional impairment was actually rated or that the individual was given formal medical restrictions. But it is critical that the preexisting condition actually constituted an impairment in that it somehow limited the individual's abilities or activities. An unknown, asymptomatic condition that is neither disabling nor ratable under the AMA *Guides* cannot serve as a basis to reduce an award under the above statute.

A physician may appropriately assign a functional impairment rating for a preexisting condition that had not been rated. However, generally the physician must use the claimant's contemporaneous medical records regarding the prior condition. The medical condition diagnosed in those records, the evidence of the claimant's subsequent activities and treatment must then be the basis of the impairment rating using the appropriate edition of the AMA *Guides*.

In this case, Dr. Pratt placed Cantu in DRE Cervicothoracic Category II for a 5 percent whole person functional impairment. And Dr. Pratt also placed Cantu in DRE Lumbosacral Category II for a 5 percent whole person functional impairment. But Dr. Pratt then concluded that 50 percent of Cantu's spinal permanency was present before the April 18, 2005 accident. Instead of reviewing the Cantu's medical records before the accident and then assigning a rating for her preexisting condition, Dr. Pratt rated Cantu's current condition and then opined that 50 percent of her current condition was preexisting. That speculative 50 percent does not comport with the statutory requirement that a preexisting rating be established using the AMA *Guides*.

Stated another way, Dr. Pratt's opinion that 50 percent of her current impairment was preexisting is a speculative opinion instead of a specific rating determined by the AMA *Guides*. K.S.A. 44-510e requires that functional impairment be determined based upon the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment. The Board has held that any preexisting functional impairment must also be determined utilizing the same criteria. Dr. Pratt's conclusion does not,

[9] K.S.A. 2005 Supp. 44-501(c).

therefore, provide a logical basis for assigning impairment to the preexisting condition. The Board will not reduce the award for preexisting impairment.

As previously noted, the Board does agree that Dr. Pratt's ratings, without a reduction for preexisting impairment, were the most persuasive in this instance. Consequently, the Board finds Cantu suffers a 14 percent whole person functional impairment.

Respondent next argues that Cantu is limited to her functional impairment because she did not make a good faith effort to retain her employment with respondent that paid 90 percent or more than her pre-injury average weekly wage. Conversely, Cantu argues that the authorized physician recommended that she find different employment and she only quit after she made a good faith effort to retain her job but was physically unable to continue to perform the job.

Because Cantu has sustained injuries that are not listed in the "scheduled injury" statute, her permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a). That statute provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*[10] and *Copeland*.[11] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above-

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[10] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). But see *Graham v. Dokter Trucking Group*, 284 Kan. 547, 161 P.3d 695 (2007), in which the Kansas Supreme Court held, in construing K.S.A. 44-510e, the language regarding the wage loss prong of the permanent disability formula was plain and unambiguous and, therefore, should be applied according to its express language and that the Court will neither speculate on legislative intent nor add something not there.

[11] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e(a), that a worker's post-injury wage should be based upon the worker's ability to earn wages rather than the actual post-injury wages being earned when the worker fails to make a good faith effort to find appropriate employment after recovering from the work-related injury.

The Board has also held workers are required to make a good faith effort to retain their post-injury employment. Consequently, permanent partial general disability benefits are limited to the worker's functional impairment rating when, without justification, a worker voluntarily terminates or fails to make a good faith effort to retain a job that the worker is capable of performing that pays at least 90 percent of the pre-accident wage. On the other hand, employers must also demonstrate good faith. In providing accommodated employment to a worker, *Foulk* is not applicable where the accommodated job is not genuine,[12] where the accommodated job violates the worker's medical restrictions,[13] or where the worker is fired after making a good faith attempt to perform the work but experiences increased symptoms.[14] The good faith of an employee's efforts to find or retain appropriate employment is determined on a case-by-case basis.

In this case, Cantu initially returned to a 32-hour work week and when she attempted her normal 40-hour work week she was unable to perform her duties. The authorized treating physician ultimately reduced her to a 28-hour work week. And Cantu testified the authorized doctor ultimately stated she needed to find a sedentary job without driving and under those circumstances could probably work a 40-hour work week. Because her work hours were limited by the authorized physician who further recommended that she change jobs, the Board concludes that Cantu did make a good faith effort to retain her job but was simply unable to continue in that employment. Consequently, she is entitled to a work disability analysis.

Dr. Pratt reviewed the list of Cantu's work tasks prepared by Mr. Doug Lindahl and concluded she could not perform 3 of the 43 non-duplicative tasks for a 7 percent task loss. Dr. Murati reviewed the list of Cantu's former work tasks prepared by Mr. Doug Lindahl and concluded she could no longer perform 13 of the 43 non-duplicative tasks for a 30 percent task loss. But Dr. Murati was adamant that Cantu could not work longer than 4 hours a day, and Cantu has demonstrated in her current job that she is able to work an 8-hour day.

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[12] *Tharp v. Eaton Corp.*, 23 Kan. App. 2d 895, 940 P.2d 66 (1997).

[13] *Bohanan v. U.S.D. No. 260*, 24 Kan. App. 2d 362, 947 P.2d 440 (1997).

[14] *Guerrero v. Dold Foods, Inc.*, 22 Kan. App. 2d 53, 913 P.2d 612 (1995).

The Board finds Dr. Pratt's opinion more persuasive and finds claimant suffered a 7 percent task loss.

When Cantu left her employment with respondent she immediately obtained a job with H & R Block from January through April 2007. Cantu next obtained employment on April 2, 2007, with Preferred Cartage Services as a receptionist and payroll clerk. As this demonstrates a good faith effort to obtain appropriate employment her actual wage loss will be used to determine the wage loss component of the work disability formula.

For the time period from January 2007 through April 2007 while Cantu was employed by H & R Block she earned $299.29 per week.[15] When compared with her pre-injury average weekly wage of $736.72 she suffered a 59 percent wage loss. This would calculate to a 33 percent work disability for this time period.

When Cantu began employment on April 2, 2007, with Preferred Cartage her average weekly wage increased to $608.89.[16] When compared with her pre-injury average weekly wage of $736.72 she suffered a 17 percent wage loss. This would calculate to a 12 percent work disability from April 2, 2007.

Because the wage loss portion of the work disability percentage changes, as Cantu's wage loss changed, the percentage of work disability varies. Simply stated, after every change in the percentage of disability, a new calculation is required to determine if there are additional disability weeks payable. If so, the claimant is entitled to payment of those additional disability weeks until fully paid or modified by a later change in the percentage of disability. This calculation method requires that for each change in the percentage of disability, the award is calculated as if the new percentage was the original award, thereafter the number of disability weeks is reduced by the prior permanent partial disability weeks already paid or due.

After April 2, 2007, Cantu's work disability decreases to 12 percent which is less than her 14 percent functional impairment. Because the extent of permanent partial general disability cannot be less than the percentage of functional impairment the last calculation must be based upon claimant's functional impairment.[17]

## AWARD

[15] R.H. Trans., Cl. Ex. 5.

[16] *Id.*, Cl. Ex. 6.

[17] See K.S.A. 44-510e(a).

**WHEREFORE**, it is the decision of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated March 28, 2008, is modified to reflect Cantu suffered a 33 percent work disability from January 1, 2007 through April 1, 2007, and thereafter a 14 percent whole person functional impairment.

Cantu is entitled to 16.97 weeks of temporary total disability compensation at the rate of $442.94 per week or $7,516.69 followed by 12.86 weeks of permanent partial disability compensation at the rate of $449 per week or $5,774.14 for a 33 percent work disability from January 1, 2007 through April 1, 2007, followed by 44.96 weeks of permanent partial disability compensation at the rate of $449 per week or $20,187.04 for a 14 percent functional disability from April 2, 2007 and thereafter, making a total award of $33,477.87, which is ordered paid in one lump sum less amounts previously paid.

**IT IS SO ORDERED.**

Dated this _____ day of August 2008.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

## CONCURRING AND DISSENTING OPINION

The undersigned agree with the majority's factual findings and its determination that claimant is entitled to a work disability. However, we disagree with the majority's conclusion that claimant's percentage of functional impairment for her scheduled injuries to her right and left lower extremities should be combined with her percentage of functional impairment for her general body injury to her back and neck for a single permanent partial disability award based upon the total of all her impairments. We read *Casco* to require the scheduled injuries to be compensated separately.

> Scheduled injuries are the general rule and nonscheduled injuries are the exception. K.S.A. 44-510d calculates the award based on a schedule of disabilities. If an injury is on the schedule, the amount of compensation is to be in accordance with K.S.A. 44-510d.
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> . . .
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> K.S.A. 44-510e permanent partial disability is the exception to utilizing 44-510d in calculating a claimant's award. K.S.A. 44-510e applies only when the claimant's injury is not included on the schedule of injuries.[18]

Because the right and left lower extremity injuries are contained within the schedule of K.S.A. 44-510d(a), claimant's disability to those extremities must be compensated according to the schedule for a separate award for each leg. The back and neck, however, are not contained within the schedule and, therefore, must be compensated as a general body disability under K.S.A. 44-510e.

All of claimant's injuries occurred as a direct result of a work-related accident. Nevertheless, claimant's lower extremity injuries are contained within the schedule of injuries in K.S.A. 44-510d. Therefore, claimant's permanent disability resulting from her lower extremity injuries are compensable as separate scheduled injuries based upon her percentage of functional impairment for each lower extremity.

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BOARD MEMBER

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BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
Terry J. Malone, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge

[18] *Casco*, Syl. ¶¶ 7, 10.